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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: MANILA Date: JAN 12 2005

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Immigration Attaché, Manila, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, the decision withdrawn and the application declared moot.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant is married to a naturalized United States citizen and she seeks a waiver of inadmissibility in order to reside in the United States with her husband.

The attaché found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen spouse. The application was denied accordingly. *Decision of the Attaché,* dated October 21, 2003.

On appeal, counsel advances two arguments. First, counsel asserts that Citizenship and Immigration Services, (CIS) erred in concluding that the applicant was inadmissible pursuant to section 212(a)(9)(B) of the Act. Consequently, the applicant did not require a waiver. *See Notice of Appeal Form I-290B,* dated November 11, 2003. In the alternative, counsel argues that the attaché erred in concluding that the evidence did not establish extreme hardship to her U.S. citizen spouse. Counsel has presented an appeal brief and additional evidence in support of the appeal. The entire record was reviewed and considered in rendering a decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
> >
> > . . . .
> >
> > (v) Waiver. – The Attorney General [Secretary] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

Before addressing the merits of the appeal, the AAO notes that the attaché's decision contains an error regarding the applicant's perceived length of unlawful presence. The attaché's decision indicates that he found the applicant to be inadmissible pursuant to subsection 212(a)((9)(B)(i)(II), as an alien who has been unlawfully present for one year or more, and who again seeks admission within ten years of the date of the alien's departure from the United States. However, the facts in the record reflect that the applicant was admitted to the United States on or about January 31, 2001, as a nonimmigrant fiancée with authorization to remain until April 30, 2001. The record further reflects that the applicant was placed in removal proceedings on or about August 6, 2002, and received a grant of voluntary departure from the immigration judge on April 16, 2002, until May 15, 2002. Information in the record indicates that the applicant departed the United States on April 25, 2002, and was admitted to the Philippines the next day, April 26, 2002. Therefore, the applicant was in the United States in an unlawful status from May 1, 2001, until her date of departure of April 25, 2002, or a period just short of one year. Consequently, if she is inadmissible, it is pursuant to subsection 212(a)(9)(B)(i)(I), and would subject her to a three year, and not a ten year bar to admission.[1]

The AAO turns now to counsel's assertion that the attaché erred in finding that the applicant was inadmissible. Counsel's argument on appeal is a simple one based upon the statutory language and the facts of the case. The argument is as follows. The statutory language makes an alien inadmissible for a period of three years in those situations where the alien was unlawfully present in the United States for more than 180 days but less than one year, but voluntarily departed the United States *prior to the commencement of proceedings* and again seeks admission within three years. According to counsel's argument, the applicant falls outside of the bar because of the unique facts of her case. While counsel acknowledges that she was unlawfully present for the requisite period of time to incur a bar to admission, she escapes the bar because she did not depart the United States *prior to* immigration proceedings being commenced. Rather, she departed the United States *after* having been placed in proceedings, and being issued an order of voluntary departure as a consequence of those proceedings. Because the ground of inadmissibility attaches only to those individuals who leave prior to the commencement of proceedings, the bar, according to counsel, does not apply. Counsel further states in his brief:

> The law is very specific. It clearly mattered to the lawmakers whether an alien departed prior or subsequent to proceedings. Otherwise there was no need to specifically refer to removal proceedings or specific sections of the Act in this section. It is interesting to note that any referral to removal proceedings, or even to how the alien departed, is absent if an alien remained in the United States for more than one year. Therefore, Mrs [redacted] asks that the literal text of the entire section be used to determine if the three year bar is applicable in this case.

Counsel's Appeal Brief Undated, at p.2.

The AAO does not necessarily agree with counsel that the statutory language necessarily is evidence of a considered act on the part of Congress to distinguish between aliens who departed the United States before the commencement of proceedings and those who departed the United States during the pendency of proceedings. Even assuming such an intention on the part of Congress it is a bit difficult to discern its

[1] If determined to be inadmissible pursuant to the bar, the AAO notes that the bar would be effective through April 25, 2005, three years after her departure from the United States.

motivation for imposing a bar to admissibility for aliens unlawfully present who choose to depart the United States prior to requiring the U.S. government to take resource intensive measures to subject the alien to formal removal proceedings, while, on the other hand, exempting from any consequences those aliens who depart the United States only after such proceedings are initiated. Nevertheless, although the AAO is unable to clearly discern Congress' motivations for structuring the bar as it did, such illumination is unnecessary for the AAO to fulfill its task of considering counsel's arguments as to whether the applicant is or is not subject to the bar.

Doing so leads the AAO to conclude that counsel makes a persuasive argument on appeal based on the statute and the facts. A review of the facts clearly demonstrates that the applicant departed the United States after the commencement of removal proceedings. The record contains a copy of the Notice to Appear issued on March 19, 2002, which placed the applicant in removal proceedings. *See Notice to Appear (Form I-862).* The record also contains a copy of the immigration judge's order dated April 16, 2002, granting the applicant voluntary departure until May 15, 2002. *See Order of the Immigration Judge,* dated April 16, 2002. Finally, counsel has also submitted a copy of the plane ticket and applicable pages of the applicant's passport reflecting that she departed the United States on April 25, 2002, arriving in the Philippines the next day, within the voluntary departure period. Consequently, the AAO concludes that the evidence in the record, and the applicable statute supports a finding that the applicant is not subject to a bar to admissibility based upon her unlawful presence in the United States. She, therefore, does not require a waiver of inadmissibility.

ORDER: The appeal is dismissed, the prior decision of the attaché is withdrawn and the application for a waiver of inadmissibility is declared moot.